

**Hearing Date and Time: April 18 2008 at 10:00 a.m.**  
**Response Date: April 15, 2008 at 4:00 p.m.**

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re	:
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DELPHI CORPORATION, <i>et al.</i> ,	:
	:
	:
Debtors.	:
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Chapter 11  
Case No. 05-44481  
Jointly Administered  
Judge Drain

**CITY OF DAYTON'S MOTION REQUESTING  
AUTHORITY TO FILE A CLAIM AFTER THE BAR DATE**

The City of Dayton, Ohio ("Dayton"), by and through its undersigned counsel, moves this Court for authority to file a claim after the bar date. Dayton respectfully states as follows:

**BACKGROUND**

1. On October 8 and 14, 2005 (the "Petition Dates"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (collectively, the "Bankruptcy Code").

2. In the Debtors' schedules of assets and liabilities, filed on January 20, 2006 ("Schedules"): (a) Delphi Corporation listed two priority, and one general unsecured non-priority, contingent, unliquidated, disputed claims for Dayton; (b) Delphi Automotive Systems

LLC listed two general unsecured non-priority contingent, unliquidated, disputed claims, and one general unsecured claim, for Dayton; and (c) Delphi International Services, Inc. listed one priority contingent, unliquidated, disputed claim for Dayton. The Debtors also included within their Statements of Financial Affairs (“Sofas”) eighteen separate liabilities related to the City of Dayton.

3. On April 12, 2006, the Court entered an order (the “Bar Date Order”), establishing July 31, 2006 as the deadline for filing proofs of claim in these cases, including the claims of government entities.

4. On or about October 5, 2006, the Debtors filed an amended tax return with Dayton, related to taxes for the 2002 tax period involving Delphi Corporation, Delco Electronics Corp., and Delphi Automotive Systems Services LLC. Such return set forth taxes owing in the amount of \$341,023.

5. On November 6, 2006, after receipt of the Debtors amended tax return, Dayton filed a priority claim in the amount of \$427,534.25 against the Delphi Corporation estate with respect to such taxes, which is referred to by the Debtors’ claims agent, Kurtzman Carson Consultants (the “Claims Agent”) as claim number 16404. The Dayton claim included the principal amount of taxes reported in the Debtors’ amended tax return, plus penalties and interest applicable per state law.

6. On April 27, 2007, the Debtors objected to Dayton’s claim number 16404 in their Thirteenth Objection, Docket No. 7825. Pursuant to the affidavit of service filed by the Claims Agent, Docket No. 7920, it is unclear whether Dayton was served with notice of the Thirteenth Objection. On June 6, 2007, the Court entered an order related to the Thirteenth Objection,

Docket No. 8194, expunging Dayton's claim number 16404. Dayton has requested reconsideration of that Order.

7. On August 7, 2007, Dayton mailed a priority claim in the amount of \$427,534.25 against Delphi Corporation's estate, referred to by the Claims Agent as claim number 16640, which is listed by the Claims Agent as having been filed on August 13, 2007.

8. On January 25, 2008, the Court entered an order confirming the First Amended Joint Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-In-Possession, Docket No. 12359 (the "Plan Order").

9. On February 15, 2008, the Debtors filed the Twenty-Sixth Objection, which objects to, among others, Dayton's claim number 16640. Dayton timely responded to the Twenty-Sixth Objection and that matter is currently pending.

#### **BASIS FOR RELIEF**

10. Dayton requests that the Court enlarge the deadline for Dayton's claim filing and deem Dayton's claim number 16640 timely filed. Rule 3003(c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") sets forth the requirements for filing claims in a chapter 11 proceeding. Rule 3003(c) provides that "[t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Rule 9006(b)(1) allows a court to permit a late filing if a claimant's failure to comply with an earlier deadline is the result of excusable neglect. *See Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 382 (1993).

**Pursuant to *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership* courts may allow late filed claims.**

11. In *Pioneer*, the U.S. Supreme Court allowed a claimant to file a claim after the filing deadline. *See id.* at 398-99. In its ruling, the Court set forth a two-step test for determining whether a late filed claim may be allowed. First, a movant must show that its failure to file a timely claim was due to neglect, as opposed to willfulness; neglect is generally attributed to inadvertent mistake, or simple carelessness. *See id.* at 387-88. Second, the movant claimant must show by a preponderance of the evidence that the neglect was excusable.

**Dayton's failure to file its claim was due to neglect and was not willful.**

12. The facts leading to the filing of claim number 16640 after the bar date reflect no suggestion of willfulness by Dayton and when constitute, at worst, simple neglect. Generally, neglect is attributed to inadvertent mistake, or simple carelessness. *See id.* at 387-88. Throughout these proceedings, Dayton has acted in good faith. The Debtors scheduled many claims for Dayton; although most of the scheduled claims were listed as "contingent unliquidated or disputed."

13. The Debtors did not file their amended tax return for 2002 until October of 2006, after the passing of the claims deadline. Dayton acted reasonably promptly by filing claim number 16404. Subsequently, the Debtors objected to Dayton's claim number 16404 in its Thirteenth Objection.

14. It is unclear whether Dayton was served with the Thirteenth omnibus objection. A review of the Debtors' affidavit of service for the Thirteenth Objection, Docket No. 7920 (the "Affidavit"), fails to expressly indicate whether Dayton received service of the Thirteenth Objection via regular U.S. mail or any other form of delivery. The Affidavit provides that

parties listed on exhibits A, B, C, E, G, I, K, and M received service of the Thirteenth omnibus objection. Dayton's name and address are not listed on exhibits A, B, C, E, G, I, K, or M. Dayton is listed on page 283 of the Affidavit, which is labeled as Exhibit D-2 of the Thirteenth Objection. The Affidavit never provides that the parties listed on Exhibit D-2 received service. Accordingly, it is unclear whether or not Dayton was served with the Debtors' Thirteenth omnibus objection.

15. Dayton did not realize that claim number 16404 was expunged in the order related to the Thirteenth Objection. In its Twenty-Sixth Objection, the Debtors state that in the twenty-five previous omnibus objections, the Court has disallowed or expunged 9,530 claims and modified approximately 3,400 claims. *See* Twenty-Sixth Objection at ¶ 18. The constant flow of information in this large chapter 11 proceeding has been overwhelming for Dayton. As soon as Dayton became aware of the expungement of claim number 16404, it filed claim number 16440.

**Dayton's neglect was excusable**

16. Dayton's neglect in filing claim number 16440 prior to the bar date was excusable. The *Pioneer* Court concluded that determining whether neglect was excusable requires a balancing of the danger of prejudice to the debtor, the length of delay, the reason for the delay, and whether the movant acted in good faith. *See id.* at 395. In considering excusable neglect, the Second Circuit considers (a) whether the failure to respond was willful, (b) whether the claimant had a legally supportable defense, or in this case, a potentially valid claim, and (c) the amount of prejudice to the debtor, if the motion is granted. *See re Enron, Inc.*, 326 B.R. 46 (Bankr. S.D.N.Y. 2005).

**Dayton's failure to file claim number  
16640 before the bar date was not willful.**

17. As stated above, Dayton did not willfully file claim number 16440 after the bar date. Through inadvertence or lack of notice, Dayton failed to respond to the Thirteenth Objection. When determining whether a failure to respond is willful, the Second Circuit requires more than "just negligence or carelessness". *See id.* at 51 (citations omitted). In this case, Dayton did not exhibit any more than negligence or carelessness. When Dayton learned that its claim had been expunged, it filed claim number 16640.

18. Even if Dayton were responsible for failing to respond to the Thirteenth Objection, it would still be most appropriate for the Court to deem Dayton's claim timely filed so that Dayton's claim could be resolved on its merits. Generally, courts favor resolving doubts about willfulness in the favor of a movant to increase the likelihood that disputes are resolved on their merits. *See id.* In this case, with doubt shrouding the Debtors' service of the Thirteenth Objection, Dayton's claim should be allowed.

**Dayton has a valid claim and the  
Debtors will not be prejudiced by its assertion.**

19. Dayton has a legally supportable claim and weighing the likely prejudices if Dayton's claim is not reconsidered, Dayton will bear the brunt of the prejudice. Dayton's claim is based upon taxes due to Dayton. After the July 31, 2006 claims filing deadline, the Debtors filed an amended tax return with Dayton, dated October 5, 2006, acknowledging taxes owed for the 2002 tax period. The Debtors acknowledged other liabilities related to Dayton in their Schedules and Statements of Financial Affairs. Based upon the Debtors' tax return, the validity of Dayton's claim may be presumed valid. Therefore, Dayton would be greatly prejudiced if its claims were not allowed on their merits.

20. In contrast, the Debtors will not be prejudiced by allowing Dayton's claim. The Debtors have not expended significant cost in objecting to Dayton's claims. Those objections were included in large omnibus pleadings and dealt with among numerous other claims. In addition, the Debtors' are still in the process of resolving many disputed claims. Therefore reviewing Dayton's claim on its merits will result in no significant time delay on the part of the Debtors' overall claims process. Further, the Debtors' inclusion of liabilities related to Dayton in its Schedules and Sofas emphasizes that the Debtors have been aware of Dayton's potential claims throughout these proceedings; accordingly, allowing Dayton's claim will not result in an unfair surprise or prejudice to the Debtors.

21. Dayton has acted in good faith throughout these proceedings; the Debtors have not alleged that Dayton willfully chose to ignore objections to its claims. Dayton's claim number 16640 was filed after the claim filing deadline, but the Debtors' Dayton tax return, the basis for claim number 16640, was also filed after the bar date. Dayton's neglect in determining that its previous claim was expunged was inadvertent. Accordingly, any neglect that may exist is excusable.

### **CONCLUSION**

For the reasons set forth above, Dayton respectfully requests that the Court (a) allow Dayton's claim 16640 as a claim deemed timely filed, and (b) grant such other and further relief as the Court deems just.

Dated: March 31, 2008

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY L.L.P.

/s/ G. Christopher Meyer

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **City of Dayton's Motion Requesting Authority to File a Claim After the Bar Date** was, in addition to electronic service

(A) served on the following on the 31st day of March 2008 via Federal Express:

Honorable Robert D. Drain  
United States Bankruptcy Judge  
United States Bankruptcy Court  
for the Southern District of New York  
One Bowling Green, Room 632  
New York, New York 10004;

and

(B) was served on the following on the 31st day of March 2008 via Federal Express on those persons listed in the Debtors' Master Service List, a copy of which is attached hereto

/s/ G. Christopher Meyer

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